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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ZACHARY M. WHITE, Appellant.	2 CA-CR 2009-0173 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR-2007-01923

Honorable Boyd T. Johnson, Judge

AFFIRMED IN PART;
VACATED IN PART AND REMANDED

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V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Zachary White was convicted of second-degree murder and weapons misconduct. The sole issue he raises on appeal is whether the trial

court reversibly erred by not permitting him to plead guilty only to the weapons misconduct charge before trial. Because we conclude the court erred in precluding White from entering a guilty plea and because we cannot say the error was harmless, we vacate White's conviction and sentence for second-degree murder, affirm his conviction for weapons misconduct, and remand this matter for further proceedings.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). On the evening of November 16, 2007, White had invited several of his friends to a party at his apartment. White and a few other men went outside to smoke, and White took a handgun out of his pants so the group could shoot out the streetlights. After the others persuaded him not to fire the gun, he put it away and shot at the lights with a slingshot instead. They eventually went back inside and played "drinking games." They then played a game that involved taking turns binding each other to a chair with duct tape. As C. was sitting in the chair, White brought out his gun and placed it against C.'s head. C. touched the barrel of the gun and told White to "do it." White then pulled the trigger, killing C.

¶3 A grand jury indicted White for one count of second-degree murder by "intentionally or knowingly causing" C.'s death ("intentional murder"), one count of second-degree murder "under circumstances manifesting extreme indifference to human life" ("reckless murder"), and one count of misconduct involving a weapon while being a

prohibited possessor. After a six-day jury trial, at which the jury was instructed on the lesser included offenses of manslaughter and negligent homicide, it acquitted White of intentional murder and found him guilty of reckless murder and weapons misconduct. The trial court found a number of aggravating factors and sentenced White to a maximum prison term of twenty-two years for reckless murder and a concurrent, presumptive term of 4.75 years for weapons misconduct, both sentences to be served flat-time. This appeal followed.

Discussion

¶4 White contends the trial court erred by not allowing him to plead guilty only to the weapons misconduct charge before trial. Although a defendant has no constitutional right to plead to a charge, there is "nothing in the Arizona Rules of Criminal Procedure . . . permitting a superior court to refuse a voluntary and intelligent unconditional plea of guilty to a charged crime simply because the State objects to the plea." *Alejandro v. Harrison*, 223 Ariz. 21, ¶¶ 8-9, 219 P.3d 231, 233-34 (App. 2009); *see also State v. Powers*, 200 Ariz. 123, ¶ 22, 23 P.3d 668, 674 (App. 2001). Indeed, "the rules . . . condition approval of a guilty plea only on findings that the offer is voluntary and intelligent and that there is a factual basis for the plea." *Alejandro*, 223 Ariz. 21, ¶ 9, 219 P.3d at 234; *see also* Ariz. R. Crim. P. 17.1.

¶5 Here, the state contends the trial court did not err in rejecting White's plea because it was not unconditional, as required by *Alejandro*. The record does not support

this contention. Prior to trial, White had filed a motion in limine seeking to exclude evidence that he was on probation for a prior felony conviction and prohibited from possessing a gun at the time of the offense. Specifically, he requested that numerous parts of his statement to police be redacted to omit any such reference. Indeed, White had based the motion on his anticipated plea to the weapons misconduct charge, which, he contended, would render this evidence irrelevant. At a hearing on the motion, the court ordered that if White pled to the charge, all but one of his evidentiary requests would be granted. But, when, at the same hearing White requested numerous additional redactions to his statement, the court delayed any further ruling until the state had received ample time to review them.

¶6 On the first day of trial, White stated he was ready to plead to weapons misconduct, with the understanding the jury would not be informed that he had pled to the offense until the penalty phase. After a lengthy discussion, the trial court started to accept White's guilty plea, but the prosecutor informed the court that the victims were "opposed to [the plea] because they believe[d] the jury should hear that he was a prohibited possessor." The court then asked the prosecutor, "[A]re you taking their position? Because I'm not going to do it if you tell me you're not in agreement with it being done." The prosecutor responded the state was prepared to go forward with the plea only if the court instructed the jury that White had stipulated to being a prohibited possessor. The following exchange then occurred:

[DEFENSE COUNSEL]: Let me explain to the Court my reasoning: We are offering a plea of guilty. Apparently at this time there's no stipulation as to what effect that will have on evidence. We are advising the Court that we are entering a plea of guilty and expecting that the Court would find certain evidence irrelevant and inadmissible based upon the fact that the [weapons misconduct charge] is not before the jury . . . . If the court is going to tell us that that ruling will not be forthcoming, then I'd like an opportunity to reconsider my position; but at this point we're ready to plead and request a ruling regardless of the stipulation by the state.

. . . .

THE COURT: Okay. Well, at this time because it is an integral part of the charges in this case and apparently an integral part of the presentation plan by the State, in the absence of an agreement by the State, I am not going to accept the plea of guilty, there being other factors involved, including the prior conviction, the commission of the offense while on release, all of which has been alleged by the State.

[DEFENSE COUNSEL]: My inclination at this point is to simply go forward with the plea because that may be the only means by which I can protect my record on appeal[,] . . . because that forces the Court to make a ruling. If the Court is telling me in advance of a plea that it's going to allow this evidence in anyway, then I think I have an adequate record . . . .

THE COURT: What I'm telling you is that this is an indictment in three counts, the state wants to go to trial on three counts and I don't believe you can pick and choose those you plead guilty to and those you go to trial on, so I am not accepting a plea to one of three charges without agreement of the parties.

[DEFENSE COUNSEL]: Well, Your Honor is advising that Mr. White will not be allowed to plea?

> THE COURT: Not to [weapons misconduct], not in absence of an agreement with the State.
>
> [DEFENSE COUNSEL]: Your Honor, we are offering a plea to [weapons misconduct] and litigation of its effect on the introduction of evidence and my understanding at this time is the Court is rejecting that offer?
>
> THE COURT: . . . What I'm doing is not accepting a plea to less than the charges. You can't pick and choose. . . . In the absence of an agreement to remove part of th[e] indictment, I don't believe you can . . . unilaterally do that.

¶7 Contrary to the state's assertion, this exchange establishes that White's offer to plead was unconditional. Once White pled to this offense, the trial court necessarily would have had to determine whether, under the facts of this case, the contested evidence was relevant and admissible. *See Alejandro*, 223 Ariz. 21, ¶ 18, 219 P.3d at 237 ("render[ing] no opinion on the admissibility of any evidence related to the charges to which [defendant] desire[d] to plead if the plea [were] accepted"). But, White's decision to plead guilty to the weapons misconduct charge was not conditioned upon the outcome of the court's ruling on the evidentiary issue that would have resulted from the plea. Moreover, the record clearly establishes the court rejected White's plea because the state did not agree to it, not because it thought the plea was conditioned on its evidentiary ruling. As we have stated, a trial court may not reject a knowing, voluntary, and factually supported plea simply because the state does not agree to it. *See id.* ¶¶ 8-9;

Powers, 200 Ariz. 123, ¶ 22, 23 P.3d at 674. The court therefore erred in precluding White from pleading guilty to the weapons misconduct charge.

¶8 However, this does not end our inquiry. Because the right to plead is not constitutional, *see Alejandro*, 223 Ariz. 21, ¶ 8, 219 P.3d at 233, we must now determine whether it was harmless error for the court to deny White's plea, *see State v. Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d 233, 236 (2009).[1] "A reviewing court will affirm a conviction despite the error if it is harmless, that is, if the state, 'in light of all the evidence,' can establish beyond a reasonable doubt that the error did not contribute to or affect the verdict." *Id.*, *quoting State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). This "'inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" *Bible*, 175 Ariz. at 588, 858 P.2d at 1191, *quoting Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis in *Sullivan*); *see also Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d at 236; *State v. Anthony*, 218 Ariz. 439, ¶ 39, 189 P.3d 366, 373 (2008). Thus, it is the state's burden to establish that the inadmissible evidence did not contribute to the jury's finding White guilty of second-degree murder rather than the lesser crimes of manslaughter or negligent homicide, or acquitting him.

[1]Notably, although we do not penalize him for not doing so, White could have but did not challenge the trial court's denial of his plea by special action, *see Alejandro*, 223 Ariz. 21, ¶ 6, 219 P.3d at 233.

¶9 White contends the error was not harmless because without the weapons misconduct charge, evidence of his prior felony conviction, probationary status, and prohibited-possessor status would not have been admitted. He argues that, without this evidence, which impugned his character, the jury might have believed his defense that the shooting had been accidental or convicted him of one of the lesser included offenses. The state counters that the error could not have affected the verdict "because evidence of [White]'s guilt[] on the reckless murder charge was overwhelming even discounting the information he was a prohibited possessor on release."[2]

¶10 The trial court instructed the jury that it could find White guilty of reckless murder if it found that "[u]nder circumstances manifesting extreme indifference to human life, [he] recklessly engaged in conduct that created a grave risk of death and thereby caused the death of another person," *see* A.R.S. § 13-1104(A)(3), or that it could find him guilty of reckless manslaughter if it found "[he] caused the death of another person by . . . [c]onduct showing a conscious disregard of a substantial and unjustifiable risk of death," *see* A.R.S. § 13-1103(A)(1). As to both instructions, the court noted that "[t]he risk must be such that disregarding it was a gross deviation from what a reasonable person in the

[2]The state does not argue on appeal that this evidence would have been admissible even if White had been permitted to plead guilty to weapons misconduct. We therefore find this argument abandoned and assume, for the purposes of this discussion, that it would not have been admissible. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (failure to argue claim in brief constitutes abandonment and waiver of claim); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi), (2).

defendant's situation would have done." And the court further instructed the jury to consider reckless manslaughter, the lesser included offense, if, "after full and careful consideration of the facts, [it] c[ould] not agree on whether to find the defendant guilty or not guilty of Second Degree Murder."

¶11 Reckless murder and reckless manslaughter require the same mental state—recklessness. The two offenses are differentiated only by the "higher quantum of recklessness" described in the second-degree murder statute. *See State v. Curry*, 187 Ariz. 623, 627, 931 P.2d 1133, 1137 (App. 1996). And it is the jury's province to determine whether a defendant's conduct manifested extreme indifference based on the circumstances surrounding the conduct in question. *State v. Woodall*, 155 Ariz. 1, 5, 744 P.2d 732, 736 (App. 1987). Therefore, "[t]he degree of recklessness is necessarily a jury question." *Id.*

¶12 There was conflicting evidence about the circumstances surrounding the gun's discharge. The jury necessarily rejected the state's theory that White had intentionally shot C. by finding White not guilty of intentional murder. Thus, the remaining issue was whether and to what extent White's actions had been reckless. It was undisputed that while drinking, White had placed a loaded gun to C.'s head, had been holding the gun when it discharged, and had attempted to cover up his involvement in the shooting by telling his friends to say that C. had shot himself. However, evidence also established that most of the eyewitnesses had been intoxicated at the time of the

shooting and that some of them were still intoxicated when they gave their statements to police, potentially calling their credibility into doubt. A few of the witnesses testified that forty-five minutes before the shooting, the weapon had been unloaded and C. had been "dry firing" it at his own head; that after initially placing the gun against C.'s head, White had removed it and "C[. had] said to do it and he put it back on his head and then . . . [t]he gun went off"; that C. may have bumped the gun; and that a malfunction that had caused the bullet not to be expended could have been caused by "the hand of somebody . . . near the shooter" creating friction against the gun's slide.

¶13 In addition to the properly admitted evidence, which, as we have just stated, was somewhat conflicting, White's girlfriend and his probation officer both testified about his probationary and prohibited-possessor status. Additionally, the probation officer testified about White's prior felony conviction. This evidence would have been inadmissible if White had been permitted to enter a plea to the weapons misconduct charge. With regard to White's prior conviction, the jury was instructed it "must not consider a prior conviction as evidence of guilt of the crime of Second Degree Murder; [it] may consider that evidence only as to the crime of Misconduct Involving Weapons."

¶14 However, no such limiting instruction was given for the evidence that White was on probation and a prohibited possessor at the time of the offense. This other act evidence constituted character evidence, which is generally inadmissible unless

admitted for a proper purpose.[3] The danger is that "the jury might use the character evidence to improperly conclude that the defendant is a bad person and therefore more likely to have engaged in the charged offense." *State v. Aguilar*, 209 Ariz. 40, ¶ 9, 97 P.3d 865, 867 (2004); *State v. Mincey*, 130 Ariz. 389, 404, 636 P.2d 637, 652 (1981); *State v. Johnson*, 94 Ariz. 303, 306, 383 P.2d 862, 863-64 (1963). And, as we already have stated, the state did not proffer a proper purpose that would have supported the admission of this evidence in the absence of the weapons misconduct charge. *See Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d at 236 (state bears burden of proving harmless error).

¶15 Given the inconsistency of the witnesses' accounts about the circumstances under which the gun had discharged and the evidence that C. may have contributed to the shooting, there was conflicting evidence that the jury was required to consider in assessing the level of White's recklessness. And here, given that it was for the jury to decide whether White had exhibited "extreme indifference to human life," "conscious disregard of a substantial and unjustifiable risk of death," or a lesser quantum of

[3]Rule 404(b), Ariz. R. Evid., precludes the admission of other acts to prove the defendant acted in conformity with those acts. However, other acts may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b). And, such evidence only becomes admissible once the court finds the state has proven the defendant committed the act by clear and convincing evidence, the evidence is offered for a proper purpose, and the probative value of the evidence is not outweighed by the potential of unfair prejudice. *State v. Terrazas*, 189 Ariz. 580, 582-83, 944 P.2d 1194, 1196-97 (1997).

recklessness, the danger that the jury could have misused the inadmissible evidence in making this assessment was particularly high. We therefore cannot say, beyond a reasonable doubt, that this evidence "did not contribute to or affect the [jury's] verdict." *Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d at 236. The error thus was not harmless.

Disposition

¶16 For the reasons set forth above, we vacate White's conviction and sentence for second-degree murder, affirm his conviction and sentence for weapons misconduct, and remand for further proceedings consistent with this decision.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge